Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-01-31 OF 1999

ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD JJCA AND PS GILL J

18 JUNE 2002

Labour Law *— Industrial Court — Dismissal — Standard of proof of dismissal of employee — On grounds of dishonesty — Whether the 'offence' must be proved beyond reasonable doubt as in a criminal prosecution in the court of law — Power of Industrial Court — Whether technicalities of the court of law be introduced to the Industrial Court*

The first respondent was a clerk at the bill payment counter of the appellant (Telekom Malaysia Kawasan Utara). He was dismissed by the appellant on, inter alia, the grounds of dishonesty.. The Industrial Court upheld the dismissal. The first respondent filed an originating motion in the High Court for an order of certiorari to quash the award of the Industrial Court. The High Court granted the order. The appellant appealed to the Court of Appeal. The Court of Appeal had to, inter alia, decide whether the theft of dishonesty allegedly committed by the employee had to be proved beyond reasonable doubt.

Held, allowing the appeal:

(1) The Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in the court of law. The Industrial Court should be allowed to conduct its proceedings as a 'court of arbitration', and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience (see p 137B–C).

(2) The Industrial Court should be allowed to discharge its functions as it was intended to by statute. The Industrial Court should be more flexible to enable it to regulate the relations between employers and workmen and to prevent and settle differences and disputes arising from their relationship (see p 141D–E).

(3) On the facts, the employee was not charged with a criminal offence of theft under the Penal Code. The proceeding was not a criminal prosecution. The Industrial Court was not going to convict the respondent as in a criminal prosecution. He was not going to be sentenced to an imprisonment or a fine or both. The parties appearing or representing the parties in the court were non-lawyers, except with permission of the court. The acts alleged to have been committed by the employee varied from insubordination, being absent without leave or just excuse to misappropriating the employer's property. There is no reason why

for some wrongs the standard of proof is lighter than in the other when the final orders, is the same (see p 137D–E).

(4) The representations by the minister to the Industrial Court should not be classified as 'civil' or 'criminal' and different burdens of proof applied in respect of each classification as is done in a court of law when finally the awards that follow are the same: dismissal or whatever. Such an exercise would also mean that it is more difficult to dismiss an employee who commits a more serious wrong than a less serious one. That does not appear to be right. It also means that no disciplinary action can be taken against an employer who had been charged for a criminal offence in court but was acquitted (see p 137F–G).

(5) The standard of proof required, is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue. But these are not 'passwords' in that the failure to use them or if some other words are used, the decision is automatically rendered bad in law (see p 141C–D).

[Bahasa Malaysia summary

Responden pertama merupakan seorang kerani di kaunter pembayaran bil perayu (Telekom Malaysia Kawasan Utara). Beliau telah dipecat oleh perayu atas alasan, antara lain, ketidakjujuran. Mahkamah Perusahaan mempertahankan pemecatan tersebut. Responden pertama telah memfailkan usul pemula di Mahkamah Tinggi untuk mendapatkan perintah certiorari bagi membatalkan award Mahkamah Perusahaan tersebut. Mahkamah Tinggi telah memberikan perintah. Perayu merayu kepada Mahkamah Rayuan. Mahkamah Rayuan telah, antara lain, memutuskan sama ada kecurian atau ketidakjujuran yang dikatakan telah dilakukan oleh pekerja tersebut telah dibuktikan melampaui keraguan munasabah.

Diputuskan, membenarkan rayuan tersebut:

(1) Mahkamah Perusahaan tidak seharusnya dibebankan dengan perkara-perkara teknikal berhubung dengan standard bukti, kaedah-kaedah keterangan dan prosedur yang dipakai dalam mahkamah undang-undang. Mahkamah Perusahaan seharusnya dibenarkan untuk menjalankan prosidingnya sebagai sebuah 'mahkamah timbangtara', dan lebih fleksibel dalam mencapai keputusannya, asalkan ianya memberikan pertimbangan yang khusus kepada merit-merit yang substansial dan memutuskan sesuatu kes dengan saksama dan penuh hemat (lihat ms 137B–C).

(2) Mahkamah Perusahaan seharusnya dibenarkan untuk melaksanakan fungsi-fungsinya sepertimana ianya diniatkan oleh statut. Mahkamah Perusahaan haruslah bersikap lebih fleksibel bagi membolehkannya melaraskan perhubungan antara majikan

dan pekerja dan menghalang serta menyelesaikan perbezaan dan pertikaian yang berbangkit daripada perhubungan mereka (lihat ms 141D–E).

(3) Berdasarkan fakta-fakta tersebut, pekerja itu tidak dituduh dengan kesalahan jenayah mencuri di bawah Kanun Keseksaan. Prosiding tersebut bukannya pendakwaan jenayah. Mahkamah Perusahaan tidak akan mensabitkan responden seperti di dalam pendakwaan jenayah. Beliau tidak akan dijatuhi hukuman pemenjaraan atau denda atau kedua-duanya. Pihak-pihak yang hadir atau mewakili pihak-pihak tersebut di dalam mahkamah adalah bukan peguam, kecuali dengan kebenaran mahkamah. Perbuatan-perbuatan yang didakwa sebagai telah dilakukan oleh pekerja adalah pelbagai, daripada mengingkari perintah, ketidakhadiran tanpa sebab atau hanya alasan kerana melesapkan harta majikan. Tidak terdapat alasan mengapa bagi sebilangan kesalahan standard bukti adalah lebih ringan daripada yang lain sedangkan perintah muktamad adalah sama (lihat ms 137D–E).

(4) Representasi-representasi oleh menteri kepada Mahkamah Perusahaan tidak sepatutnya diklasifikasikan sebagai 'sivil' atau 'jenayah' dan beban membukti yang berlainan yang diterapkan berhubung dengan setiap satu klasfikasi sepertimana yang dilakukan di dalam mahkamah undang-undang sedangkan akhirnya award yang menyusuli adalah sama: pemecatan atau apa pun. Usaha yang sedemikian akan juga bermaksud bahawa ianya adalah lebih sukar untuk memecat seseorang pekerja yang telah melakukan perbuatan salah yang lebih serius daripada yang lebih ringan. Ini nampaknya tidak betul. Ianya juga bermakna bahawa tiada tindakan tatatertib boleh diambil terhadap seseorang pekerja yang telah dituduh bagi kesalahan jenayah dalam mahkamah tetapi telah dibebaskan (lihat ms 137F–G).

(5) Standard bukti yang diperlukan, adalah standard sivil berdasarkan imbangan kebarangkalian, yang mana adalah fleksibel, supaya tahap kebarangkalian yang diperlukan adalah berkadaran dengan sifat graviti isu tersebut. Tetapi ini bukannya 'passwords' yang mana dengan kegagalan untuk menggunakannya atau jika sebilangan perkataan lain digunakan, keputusan tersebut adalah secara automatik menjadi tidak wajar di sisi undang (lihat ms 141C–D).]

Notes

For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1234–1237.

Cases referred to

Airline Stewards & Hostesses of New Industrial Union of Workers v Air New Zealand Ltd (1990) 3 NZLR 549 (refd)

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu [1997] 2 MLJ 45 (refd) A
Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)
Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira [1996] 3 MLJ 489 (refd)
Honda New Zealand Ltd v New Zealand Boilmakers' etc Union (1991) 1 NZLR 392 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd) B
Jennico Associates Sdn Bhd v Lillian Therera De Costa & Anor [1998] 3 CLJ 583 (refd)
Kumpulan Peransang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (refd) C
Management of Balipara Tea Estate v Its Workmen AIR 1960 Supreme Court 191 (refd)
Monie v Coral Racing Ltd (1981) ICR 109 (refd)
Nadarajah v Golf Resort (M) Bhd [1992] 1 MLJ 506 (refd)
Sabah Plantation Industry Employee's Union v Sama Subur Sdn Bhd, Tawau & Anor [1995] 2 MLJ 378 (refd) D
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 (refd)

Legislation referred to E

Federal Constitution art 5(1)
Industrial Court Enactment 1940
Industrial Courts Ordinance 1940
Industrial Courts Ordinance 1948
Industrial Relations Act 1967 ss 20(1), (2), (3), 27, 29, 30(4), (5), 33A, 33B(1) F

Siva Kumar Kanagasabai (*A Selvamalar* with him) (*Skrine*) for the appellant.
Pravian Kaur Jessy (*Jessy & Assoc*) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): The first respondent was a clerk at the bill payment counter of the appellant (Telekom Malaysia Kawasan Utara). He was dismissed by the appellant. The Industrial Court upheld the dismissal. The first respondent filed an originating motion in the High Court for an order of certiorari to quash the award of the Industrial Court. The High Court granted the order. The appellant appealed to this court. We allowed the appeal with costs. Here are the grounds for allowing the appeal. G H

Briefly, the first respondent was alleged to have received a total of RM5,168.77 in cash from customers who came to settle their bills, issued receipts showing that they were paid by cheques belonging to Natkunasingam for the same amount which cheques were dishonoured thus causing a loss to the appellant. He was 'charged' for an 'offence' under Polisi Syarikat MPSTM-43-Kesalahan Berat Perkara 2 iaitu 'Mencuri atau menipu termasuk cuba mencuri atau cuba menipu dalam keadaan yang I

A berkaitan dengan harta benda Syarikat dan boleh diambil tindakan mengikut art 64 Perjanjian Bersama 11/1992.'

As said by the learned judge, the first respondent's complaints before him were not directed to the decision making process but to the substance of the award of the Industrial Court. The learned judge then considered the
B evidence before the Industrial Court in great detail. However, he concluded that there was no element of irrationality or illegality in the finding of the Industrial Court, except for the fact that the Industrial Court had made an error of law in finding the first respondent 'guilty of the charge' on the balance of probabilities and not on a beyond reasonable doubt test. It is only on this point that we have to address ourselves. Simply put, the question is:
C when an employee is dismissed on the ground that he has committed an act of dishonesty like 'theft' of the employer's property, must the 'offence' be proved beyond reasonable doubt as in a criminal prosecution in the court of law?

It appears that no court in this country higher than the High Court has
D had the occasion to consider this point. There appears to be only two High Court judgments in which the standard of proof is mentioned. The first is the case of *Jennico Associates Sdn Bhd v Lillian Therera De Costa & Anor* [1998] 3 CLJ 583. In that case, Azmel J says, at p 590:

> The only difference between this case and a normal criminal sexual charge is that in this case the standard of proof required for the claimant to prove
E is on a balance of probabilities whereas in a criminal charge the standard of proof is on a beyond reasonable doubt. But the onus of proof does not shift. The onus shall always be on the claimant to prove such allegations on a balance of probabilities relying on her own evidence and other witnesses and documents.

F The learned judge in the present case did not refer to this case in his judgment. It may well be that it was not brought to his attention.

The other case is the case of *Sabah Plantation Industry Employee's Union v Sama Subur Sdn Bhd, Tawau & Anor* [1995] 2 MLJ 378. In that case an employee was dismissed for participating in an illegal strike, and that as a result, she was absent from work for three days without obtaining prior
G permission. The Industrial Court confirmed the dismissal. An application was made to the High Court for an order of certiorari to quash the award on grounds which do not concern us here. The learned judge quashed the award and, in passing, made a remark at p 383:

> It was also clear that the findings of guilt for those alleged crimes were not on
H the standard of proof of beyond reasonable doubt, but on the balance of probabilities.

In other words, the learned judge was also of the view that the standard of proof should be the beyond reasonable doubt test.

This case was referred to by the learned judge in his judgment.

I The learned judge also relied on the Federal Court judgment in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 in which Mohd Azmi FCJ, delivering the judgment of the court, said at pp 59–60:

> ... where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on a balance of probabilities.

The learned judge in *Krishnan Kutty a/l Sanguni Nair v Telekom Malaysia Kawasan Utara & Anor* [1999] 4 MLJ 393 then went on to say at p 407:

> His Lordship was of course referring to civil proceedings in a court of law. But an inferior tribunal charged with the responsibility of deciding on the guilt of a person is obliged to apply the same test.

After referring to art 5(1) of the Federal Constitution and citing the case of *Hong Leong Equiptment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 for the interpretation thereof, the learned judge in *Krishnan Kutty* went on to say at pp 408–409:

> Now, the law in this country, as it is elsewhere in other common law jurisdictions, is that a person facing a criminal charge no matter how trivial, is presumed to be innocent until proven guilty. Under the law, he has the fundamental right to be tried before a competent court exercising criminal jurisdiction which must find him guilty beyond reasonable doubt before he can be convicted. If he has to appear before any other court of law or any inferior tribunal on a civil matter the determination of which requires the prior finding of his guilt on a criminal charge, it follows that that finding must first be proved beyond reasonable doubt, in order that his right to be heard in accordance with law be not impinged, as indeed it would be if a lesser burden of proof is applied.
>
> There is a strong rationale why the law prescribes the higher standard of proof in offences of a criminal nature, as opposed to the civil standard in civil wrongs. Whereas persons wrongly accused of civil wrongs can be compensated by damages and other suitable remedies, the damage and stigma that befalls a person who is found guilty of a criminal offence is irreversible and is likely to remain with him for the rest of his life. Before a person can be pronounced guilty of a charge therefore, the court or tribunal must be very sure of his guilt. Thus in *Sabah Plantation Industry Employees' Union v Sama Subur Sdn Bhd, Tawau & Anor* [1995] 2 MLJ 378 where the High Court had to rule whether the Industrial Court was right in its ruling to uphold the dismissal of an employee who had participated in an illegal strike which constitutes a criminal offence, Abu Mansor J (as he then was) granted an order of certiorari to quash its decision on the ground, inter alia, that:
>
> > It was also clear that the finding of guilt for the alleged crimes were not on a standard of beyond reasonable doubt, but merely on a balance of probabilities.
>
> Abu Mansor J in that case was referring to criminal offences in general; a fortiori, where the crime involves elements of dishonesty as in the present motion.
>
> In order to decide whether the applicant had been dismissed without just cause, the Industrial Court must first decide on the guilt of the applicant. Having taken upon itself to decide on the guilt of the applicant, it follows that it is now obliged to apply the same stringent requirement of proof beyond reasonable doubt as if the applicant had been tried in a court of law exercising

criminal jurisdiction. In applying the lower standard of proof, it had impinged on the constitutional right of the applicant and in the process, committed an error of law.

The learned judge concluded at p 410:

> Having found that an error of law had been committed by the Industrial Court, it follows that its decision must accordingly be quashed.

With respect I disagree with the learned judge.

In this country, the history of the Industrial Court began in 1940 with the enactment of the Industrial Court Enactment 1940 by the Federated Malay States and the Industrial Courts Ordinance 1940 for the Straits Settlement. When the Federation of Malaya was formed in 1948, those laws were repealed and the Industrial Courts Ordinance 1948 (F of M 37 of 1948) was introduced — see *Undang-Undang Perhubungan Perusahaan Di Malaysia* by Wu Min Aun. However, for our purpose, we need only look at the Industrial Relations Act 1967 ('Act') which has replaced the earlier Ordinance.

That Act was passed 'for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any difference or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom'.

The Act, inter alia, established the Industrial Court consisting of a president and a panel of persons, each panel representing the employers and the workmen. Only the president and the chairman have to be legally qualified persons. The court sits with a president or chairman and two members, one from each panel.

In the case of a dismissal, as in this case, where a workman considers that he has been dismissed without just cause or excuse by his employer, he may make representations to the Director General for Industrial Relations to be reinstated in his former employment (s 20(1)). Upon receipt of the representations, the director general is required to take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at. However, where the director general is satisfied that there is no likelihood of a settlement, he is required to notify the minister (s 20(2)). The minister may, if he thinks fit, refer the representation to the Industrial Court for an award (s 20(3)). The power of the court is provided in s 29 and include the power to conduct its proceedings or any part thereof in private and after consultation with the minister, to call in aid of experts, a clear departure from the procedure in a court of law.

Section 27 provides for people who may appear in person or represent a party that includes an officer or employee of a trade union, a duly authorized employee, and only with permission of the president or chairman, by an advocate. In making an award, the court is required to take into consideration matters that a court of law in giving its judgment will not be looking into. In particular, s 30(4) and (5) provide:

> (4) In making its award in respect of a trade dispute, the court shall have regard to the public interest, the financial implications and the effect of

the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries. A

(5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

Section 33A empowers the Industrial Court to refer questions of law to the High Court. A decision of the High Court in such a reference 'shall be final and conclusive and no such decision shall be challenged, appeal against, reviewed, quashed or called in question in any other court or before any authority, judicial or otherwise, whatsoever'. B

Regarding the award of the Industrial Court, s 33B(1) provides: C

> Subject to this Act and the provisions of s 33A, an award, decision or order of the court under this Act (including the decision of the court whether to grant or not to grant an application under s 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

Be that as it may, it is now established law that the court may, through judicial review quash such awards. In so doing, the court again, over the years, have expanded the grounds for judicial review, giving itself wider powers to intervene in the decisions of the Industrial Court. Now, should the court also, through judicial review, introduce the technicalities of the court of law to the Industrial Court, the very thing that the creation of the Industrial Court was meant to avoid? We do not think so. D E

In *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753, the Federal Court held at p 762:

> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal. F

In *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, Hashim Yeop A Sani J, delivering the judgment of the court said at p 307: G

> It must not be forgotten that the Industrial Court is essentially a court of arbitration especially for the purpose of dealing with any trade dispute referred to it (s 22(1) [of the Industrial Relations Act 1967]).

In *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira* [1996] 3 MLJ 489, Gopal Sri Ram JCA delivering the judgment of the court said at p 510: H

> Further, s 30(5) of the [Industril Relations] Act [1967] imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience. I

In *Nadarajah v Golf Resort (M) Bhd* [1992] 1 MLJ 506, Eusoff Chin J (as he then was) says at p 511:

> It is therefore to be observed that in view of the provision of s 30(5) of the [Industrial Relations] Act [1967], the Industrial Court must act according to equity, good conscience and the substantial merits of the case *without* regard to technicalities and legal form. Technical rules such as estoppel, limitation, laches, acquiescence, etc (unless otherwise provided for in the Act) have no place in industrial adjudication and they should not be allowed to be invoked for defeating claims which are just and proper. (Emphasis added.)

This passage was quoted with approval by the Supreme Court in *Kumpulan Peransang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789, at p 800.

From all these, it is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in the court of law. The Industrial Court should be allowed to conduct its proceedings as a 'court of arbitration', and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience.

The employee is not charged with a criminal offence of theft under the Penal Code. The proceeding is not a criminal prosecution. The Industrial Court is not going to convict the respondent as in a criminal prosecution. He is not going to be sentenced to an imprisonment or a fine or both. The parties appearing or representing the parties in the court are non-lawyers, except with permission of the court. The acts alleged to have been committed by the employee vary from insubordination, absent without leave or just excuse to misappropriating the employer's property. There is no reason why for some wrong the standard of proof is lighter than in the other when the final order is the same.

We do not think that representations by the minister to the Industrial Court should be classified as 'civil' or 'criminal' and apply different burden of proof in respect of each classification as is done in the court of law when finally the awards that follow are the same: dismissal or whatever. Such an exercise would also mean that it is more difficult to dismiss an employee who commits a more serious wrong than a less serious one. That does not appear to be right to us. It also means that no disciplinary action can be taken against an employer who had been charged for a criminal offence in court but was acquitted.

Since no court in this country higher than the High Court has made a pronouncement on this issue, perhaps we should also look at other jurisdictions.

In *Monie v Coral Racing Ltd* (1981) ICR 109, the Court of Appeal in England had to decide an appeal by an employee who had been dismissed for dishonesty. Money was stolen from the employers' safe in circumstances such that only the employee or an assistant manager could have taken it. The employers did not know who was responsible and dismissed them both for dishonesty. The Court of Appeal, dismissing the appeal by the employee held, inter alia:

Held, dismissing the appeal, (1) that whether a dismissal based on mere suspicion of an employee's theft was fair depended on whether in all the circumstances of the case the employers had acted reasonably in treating their suspicion as a sufficient reason for dismissing the employee: that such reason was in the circumstances a 'reason related to the conduct of the employee'; and that the industrial tribunal, having asked themselves whether there were solid and sensible grounds on which the employers could reasonably suspect dishonesty, were entitled to find that the employers had discharged the onus of proof under para 6(8) of Sch 1 to the Act (post, pp 121D, 122G–123E, 124C–G, 126G–127A, D–F, G–128B).

In *Employees' Misconduct As Cause for Discipline and Dismissal in India and the Commonwealth* by Alfred Avins, (1968 Ed), the learned author, citing numerous authorities says:

Section 284 — Proof

The British Columbia Supreme Court has ruled that an employer need not prove the guilt of an employee beyond a reasonable doubt to impose disciplinary sanctions, and hence acquittal of theft by a criminal court is no bar to dismissal by the employer. A fortiori, an employer need not reinstate an employee dismissed for theft because the conviction has been set aside on appeal. As the Hyderabad High Court has remarked: 'It is for ... [the employer] to see how far the services of such a suspicious character can be safely continued taking into view ... the value of the property with which ... [he] had to deal.

The standard of proof must be sufficient to measure up to a preponderance of the evidence, taking all reasonable inferences into account.

The Supreme Court of India in *Management of Balipara Tea Estate v Its Workmen* AIR 1960 Supreme Court 191, says:

In making an award in an industrial dispute referred to it, the tribunal has not to decide for itself whether the charge framed against the workman concerned (in this case falsification of accounts and misappropriation of funds) has been established to its satisfaction; it has only to be satisfied that the management of a business concern was justified in coming to the conclusion that the charge against its workman was well founded. If there is finding by the tribunal that the management has been actuated by any sinister motives, or has indulged in unfair labour practice, or that the workman has been victimized for any activities of his in connection with the trade unions, it may have reasons to be critical of the enquiry held by the management.

The tribunal misdirects itself in so far as it insists upon conclusive proof of guilt to be adduced by the management in the inquiry before it. It is well settled that a tribunal has to find only whether there is justification for the management to dismiss an employee and whether a case of misconduct has been made out at the inquiry held by it.

Normally, one would expect the Indian Court to be very technical in its approach and insist on the higher burden, but this judgment shows otherwise.

Two judgments of the Court of Appeal, Wellington, New Zealand will also throw some light on the approach of the court on the issue. In *Airline Stewards & Hostesses of New Industrial Union of Workers v Air New Zealand Ltd* (1990) 3 NZLR 549, four Air New Zealand Ltd cabin crew members

were believed by United States Customs to have attempted to import into Hawaii alcohol removed from the bonded stock in the aircraft. Air New Zealand was fined US$500 for violation of United State Customs Regulations. Air New Zealand, after making extensive inquiries into the matter, dismissed them for serious misconduct. Air New Zealand did not allege that the employees had committed theft, but did allege that they caused the company grave embarrassment by being found attempting to bring on shore bonded stock from the aircraft. The Court of Appeal, held, inter alia:

> (2) The employer is required to prove, however, on the balance of probabilities that on the facts available to him after reasonable inquiry made by him the dismissal has been shown to be justifiable (see p 554 line 39).
>
> (3) The test is whether the employer has shown that the decision to dismiss was in the circumstances and at the time a reasonable and fair decision. He must show that he had reasonable grounds to believe and did honestly believe that there had been misconduct by the employee of sufficient gravity to warrant dismissal (see p 555 line 51).

In *Honda New Zealand Ltd v New Zealand Boilmakers' etc Union* (1991) 1 NZLR 392, a worker who was stopped by the gatekeeper carrying a can of thinners, was dismissed for 'unauthorized possession of company property'. The Court of Appeal, Wellington, New Zealand held, inter alia:

> Held: (1) In a wrongful dismissal case, the normal principles as to the standard of proof apply. Application of the relevant principle calls for flexibility, according to the nature of the allegation, and where the allegation is a particularly grave one, the evidence must be correspondingly convincing. Flexibility of a civil standard is particularly desirable in disputes arising out of a person's employment. Proof of misconduct must not be confused with the process of justifying dismissal and the views of the Labour Court as to matters of fact in relation to the first issue go to the merits and are not reviewable (see p 395 line 22).

It is interesting to note that MP Jain, the learned author of *Administrative Law of Malaysia and Singapore*, as meticulous as he is, does not deem it fit to discuss the question of standard of proof under a specific heading or sub-heading. However, at p 327 of the 3rd Ed of the book, the learned author says:

> What is needed to sustain findings of fact by an adjudicatory body is some evidence of probative value. A finding based on evidence of no probative value is no good.

HWR Wade and CF Forsyth, in the 7th Ed of *Administrative Law* discussed the 'Standard and Burden of Proof' under a sub-heading. On the standard of proof, the learned authors have this to say:

> Nearly all the cases which concern administrative law are civil, as opposed to criminal, proceedings. The standard of proof of facts, accordingly, is the civil standard, based on the balance of probabilities, as contrasted with the criminal standard which requires proof beyond reasonable doubt. Even where, as

sometimes in disciplinary proceedings, the language of the Act or regulations has a criminal flavour, speaking of 'offences', 'charges' and 'punishments', the standard of proof remains the civil standard. A

But the civil standard is flexible, so that the degree of probability required is proportionate to the nature and gravity of the issue. Where personal liberty is at stake, for example, the court will require a high degree of probability before it will be satisfied as to the facts justifying detention; and the requirement will not be much lower in matters affecting livelihood and professional reputation, or where there is a charge of fraud or moral turpitude. B

It should be remembered that the question of standard of proof is closely connected with the question of finding of facts. For a summary of the law, it is sufficient to quote some relevant passages from MP Jain's *Administrative Law of Malaysia and Singapore* (3rd Ed), beginning from p 714: C

The courts have emphasized time and again that certiorari should not be used by way of a disguised appeal from findings of fact. The courts have thus laid down the norm that they would not interfere with the findings of fact by a body unless the same are completely unsupported by any evidence. This is known as the 'no evidence' rule. A finding having no evidence to support it is characterized as a 'perverse' finding of fact; it is regarded as an effort of law and is quashed. If, however, there is some evidence to support a finding of fact, the courts do not interfere with it. The courts do not regard it as their function to interfere with the findings of fact by a body merely because of insufficiency or inadequacy of evidence. D E

...

If there is some evidence to support a finding of fact, it is not then for the courts to go into the sufficiency or adequacy of the evidence. It is not the court's function to review, reassess, reappreciate, reappraise evidence, or draw its own inferences as to facts from the evidence. The court will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence. The court has to take the evidence as it stands and not go into the question of its reliability in a petition for certiorari. A finding based solely on conjecture, surmise or suspicion is a finding based on no evidence. Such a finding can be quashed by the court. If there is some evidence to support a finding, then the court would not quash the finding on the ground that the evidence was insufficient. But when there is absolutely no evidence on record to support a finding, then the court will interfere. F G

...

As regards findings of fact by the Industrial Court, the Federal Court observed in *Non-Metallic Mineral Products Manufacturing Employees Union v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 at p 69: H

> 'That tribunal was charged with findings of fact, and unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its findings of fact.'

Again rejecting an application for certiorari against a decision of the Industrial Court, the Supreme Court observed in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at p 421: I

> 'It is surely not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come to.'
>
> Weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including 'theft', is not required to be satisfied beyond reasonable doubt that the employee has 'committed the offence', as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as 'solid and sensible grounds', 'sufficient to measure up to a preponderance of the evidence', 'whether a case ... has been made out', 'on the balance of probabilities' and 'evidence of probative value'. In our view, the passage quoted from *Administrative Law* by HW R Wade and CF Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue. But, again, if we may add, these are not 'passwords' that the failure to use them or if some other words are used, the decision is automatically rendered bad in law.

The Industrial Court should be allowed to discharge its functions as it was intended to be by statute. The Industrial Court should be more flexible to enable it to regulate the relations between employers and workmen and to prevent and settle differences and disputes arising from their relationship. That is what it is meant to be.

Coming back to this case. The learned judge, in looking for 'elements of irrationality or illegality' of the award had examined the evidence, point by point, with great thoroughness even though the proceeding before him was for a judicial review. In spite of that, he concluded:

> Except for the sixth complaint that the learned chairman had applied the incorrect standard of proof, which I shall revert to in a moment, it is clear to me that the learned chairman had properly considered the evidence of the witnesses appearing before him and had come to the right conclusion with respect to the culpability of the applicant at least on basis of the civil standard of balance of probabilities that he had applied. The learned chairman was perfectly entitled to come to his own finding of fact as stated in his award. In particular, he was perfectly at liberty to accept the evidence of the issuer of the cheques Natkunasingam (Cow-2) alone to conclude as he did that the cheques were issued by the said Natkunasingam in preference over any other evidence which may indicate otherwise.

And again:

> Having said that, it follows that save for the sixth point of the submission, which I shall deal with shortly, I must accept as correct the submission of counsel for the respondent, Mr Melvin Poi, that there was no element of irrationality or illegality in the finding of the learned chairman. His finding of facts, to use the words of Lord Denning in *TA Miller, Ltd v Minister of Housing and local government*, was logically probative, and therefore cannot be impeached.

However, it was on the ground that the Industrial Court had applied the wrong standard of proof that the learned judge quashed the award. It was there that he found the Industrial Court wrong. It is there that, with respect, we think that the learned judge had gone wrong. We therefore allowed the appeal with costs. We also set aside the order of the learned judge and confirmed the award of the Industrial Court. Deposit to be refunded to the appellant.

Appeal allowed.

Reported by Peter Ling